

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



No.

**76-6107**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

VERNICE DUBOSE, et al.,  
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,  
Defendants-Appellants.

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CLAUDIA WALTER, et al.,  
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,  
Defendants-Appellants.

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JANETTE LITTLE, et al.,  
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,  
Defendants-Appellants.

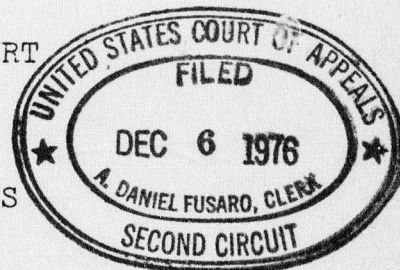
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS

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Plaintiffs strenuously maintain that P.L. 94-378, the recent appropriation act which frees the reserve fund from the operating subsidy program and makes it available for a wide variety of other programs as well, is entirely consistent with

their position that Congress favors the operating subsidy program and has commanded its implementation. The enactment of this statute, however, makes plain that Congress has no strong commitment to the operating subsidy program, since the sole financial resource expressly allocated to the program, the reserve fund, has been eliminated.

a. Three effects of P.L. 94-378.

More importantly, there are three effects of P.L. 94-378 upon this litigation which plaintiffs have been unable to mitigate. First, the statute makes it plain, as we have observed in our main brief (pp. 56-68), that the specific release by Congress of contract authority is required before any of the amounts contained in the reserve fund may be utilized. Thus, the statute provides that the reserve fund (in addition to the appropriated sums) shall be available "for the payments on contracts entered into pursuant to the authorities enumerated above". And as the conference report states, the purpose of making available these "excess rental charges" is "to liquidate contract obligations for a number of programs under the housing payments account" (House Report No. 94-1362, 94th Cong., 2d Sess., p. 5) (emphasis added). These express statements make abundantly clear what we have consistently maintained -- that unless Congress has released authority to enter into a contract, the Secretary is barred from using the reserve fund (or any of the appropriated sums). There is nothing in section 236(g) itself which authorizes the

Secretary to enter into contracts. P.L. 94-378 thus destroys the principle ground upon which the district court's decision is based, i.e., that the reserve fund may be utilized for the operating subsidy program even in the absence of the separate release by Congress of contract authority.

Second, contrary to plaintiffs' contention, the statute makes it plain that the Secretary possesses discretion as to how she allocates the amounts contained in the reserve fund. The statute simply grants the Secretary authority to utilize the reserve fund for any of the enumerated uses, without attempting to establish any priorities concerning its use. Thus, it is manifest that, contrary to what the district court concluded, the Secretary is not under a mandatory legal duty immediately to make additional assistance payments for operating subsidies directly from the reserve fund.

Third, P.L. 94-378 contains no release of contract authority for section 236. In view of the Secretary's public position that she lacks sufficient contract authority to administer the operating subsidy program, Congress' refusal to release additional contract authority is a clear indication Congress accepts the Secretary's position. (We are advised by the Department of Housing and Urban Development that the amount of unobligated section 236 contract authority as of June 30, 1976, has declined to \$36.1 million.)

In sum, the enactment of P.L. 94-378 provides additional support for the arguments in our brief that the Secretary has acted properly -- and with Congressional approval -- in determining to utilize her remaining section 236 contract authority to stimulate housing production rather than for operating subsidies. P.L. 94-378 makes it absolutely clear that contract authority is required for the implementation of the section 236 program, and that the reserve fund may not be utilized in the absence of the specific release by Congress of contract authority.

b. Legislative History

Plaintiffs maintain, however, that the legislative history of the statute shows that it has no effect on pending cases, and thus preserves their right to continuing payments from the reserve fund. This contention is without merit.

As noted in our main brief, pp. 55-56, P.L. 94-378 is the Congressional response to the fact that the reserve fund had been idled by the Secretary's decision not to implement the operating subsidy program. On March 12, 1976, the Senate Committee on Banking, Housing, and Urban Affairs observed that:

the reserve fund is required under Section 236(g) of the Act to be used for additional operating assistance payments under the terms specified in Section 236(f)(3). The Committee is concerned that HUD has not yet implemented the Act. [S. Rep. No. 94-749, 94th Cong., 2d Sess. 10 (1976)]

What Congress subsequently decided to do, instead of requiring HUD to implement the operating subsidy program and utilize the

reserve fund for that purpose, was to allow the Secretary to spend the fund on other housing programs. P.L. 94-378 changed the existing law by making the fund available for numerous housing programs, not just the operating subsidy program. In that way, the fund is no longer idle and the Secretary's expertise in fashioning an effective, overall housing program is given effect.

The colloquy on the Senate floor between Senators Sparkman and Proxmire, cited by plaintiffs (Br. pp. 57-60), confirms that Congress by P.L. 94-378, deliberately intended to free the reserve fund for other programs after October 1, 1976. The original House bill contained the provision making the reserve fund available for the other programs. The Senate, however, through Senator Sparkman, took exception to this provision of the House bill. Senator Sparkman, vigorously criticizing HUD's refusal to implement the operating subsidy program, offered an

amendment [which] would delete the provision of the committee bill authorizing excess rental charges credited to HUD under section 236(g) of the National Housing Act to be available for use in other housing programs. [122 Cong. Rec. S 10775 (June 26, 1976 daily ed.).]

Senator Proxmire observed, "It is most important that we do our very best to keep the section 236 tax and utility subsidy program going." Ibid. The effect of the amendment, as Senator Proxmire noted, is "that this money be kept in the program and not distributed elsewhere." Ibid. Senator Sparkman then responded,

MR. SPARKMAN. That is what we have provided in the law. [Ibid.]

After these views were expressed, the Senate agreed to the amendment.

In Conference, however, the amendment was specifically rejected, and the making available of the fund for other programs was once again proposed and was enacted into law by both houses. See H. Rep. No. 94-1362, 94th Cong., 2d Sess. p. 5.<sup>1/</sup> Nothing could be plainer than that Congress considered perpetuating the fund for operating subsidies alone, and rejected that course of action.

In an attempt to immunize this litigation from the effect of P.L. 94-378, plaintiffs rely upon the comment of the Conference Committee on P.L. 94-378 that "this action [i.e., the making available of the fund for other purposes] shall not prejudice any suit now or hereafter before the courts in this area."<sup>2/</sup> However, the Committee certainly did not intend to impose any limitation on the Secretary's use of the fund; for in that case, the obvious course would have been to incorporate the qualification in the statute itself. Rather, what the Committee intended was the standard caveat by Congress that it

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<sup>1/</sup> See also the final paragraph of the Comptroller General's July 7, 1976 letter under the Impoundment Control Act to the Congress (reproduced at p. 6a infra).

<sup>2/</sup> House Report No. 94-1362, 94th Cong., 2d Sess., p. 5.

did not intend to preclude the courts from granting a remedy to the litigants before it if they were entitled to one. This case could not become moot because of any transfer of the reserve fund. In other words, what Congress meant was that the making available of the fund for other programs would not bar plaintiffs from an appropriate remedy if they prevail in this litigation. In this significant sense, therefore, P.L. 94-378 does not "prejudice any suit . . . before the courts in this area." This cautionary language cannot be given any greater effect than this, unless the plain language of the statute making the reserve fund available for contracts on the other programs is to be contradicted.

c. The "Recission" Message

Plaintiffs can derive no comfort from the Comptroller General's transmission on April 20, 1976 of a "recission" message to the Congress pursuant to the Impoundment Control Act of 1974, 31 U.S.C. 1400 et seq. (1970) (Supp. IV). The Comptroller General in that message contended that the Secretary had unlawfully withheld the reserve fund from obligation in violation of the Impoundment Control Act. See also the Comptroller General's subsequent letter of July 7, 1976 (reproduced at p. 4a infra). As HUD has pointed out in its reply to the Comptroller General's message (reproduced at p. 1a infra), however, the Comptroller General's decision is based upon an erroneous construction of the Impoundment Control Act. Furthermore, the Impoundment Control Act makes the Comptroller General's

action irrelevant to this litigation. Thus, section 1400(3) of the Act expressly provides (31 U.S.C. 1400(3) (Supp. IV)):

Nothing contained in this Act \* \* \*  
shall be construed as

\* \* \* \* \*

(3) affecting in any way the claims  
or defenses of any party to litigation  
concerning any impoundment \* \* \*.

Finally, the enactment of P.L. 94-378 subsequent to the Comptroller General's message moots the controversy between the Secretary and the Comptroller General. The Comptroller General alleged that the Secretary in failing to disburse the reserve fund had made a "rescission" of budget authority which was required to be reported to Congress under 31 U.S.C. 1402(a) (1970) (Supp. IV). Regardless of the validity of the Comptroller General's charges, the fact of the matter is that in light of P.L. 94-378, the Secretary presently does intend to disburse the reserve fund. Thus, the controversy between the Comptroller General and the Secretary is over.

Finally, a few general observations regarding the plaintiffs' arguments remain to be made. First, they are simply wrong in contending that the reserve fund is an "alternative" statutory method of funding the operating subsidy program, which does not require contract authority. Congress could not, in framing the legislative scheme, have contemplated such a substantial role for the reserve fund. For the amount in the fund can never be

ascertained in advance -- indeed, for all that could be known by Congress in establishing the fund, there might be no "excess" rents to be deposited in the fund whatsoever. Obviously, then, the fund is no more than an ancillary source of money, in addition to appropriations, to be used in connection with contract authority. Obviously, if Congress mandated the operating subsidy program, it would have chosen a more reliable means of implementing it. And Congress did so in choosing the mechanism of contract authority, which Congress could regulate in advance, and thus assure itself of a viable program. The reserve fund, therefore, is no more than an ancillary source of money, in addition to appropriations, to be used in connection with contract authority.

Secondly, the fund has always been inadequate to bear the weighty legislative role which plaintiffs have assigned to it. The amount in the fund which can lawfully be used for the program is approximately \$36 million as of October, 1976. It required two years, from 1974, to accumulate it, and yet will serve only for approximately seven months of operating subsidies (this is so because the cost of the program would be \$51 million a year (Aff. of Secretary Hills)).<sup>3/</sup> It is absurd to maintain that Congress intended a new, statutory mechanism for operating subsidies with an inadequate and uncertain, means such as the reserve fund.

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<sup>3/</sup> While the amount in the fund is approximately \$50 million, of that sum \$18 million must be refunded to project owners because of improper collection.

Finally, the judgment of the Secretary that the operating subsidy program is poorly conceived, ineffective, and discriminatory, should not be lightly disregarded. She has already implemented alternatives to the rent-control aspects of section 236 by another program -- the so-called "section 8" program, which operates to keep lower-income tenants' rent at a 25 percent level, regardless of increased operating costs (Secretary Hills' aff.). Section 8 requires contract authority and appropriated funds. Accordingly, to the extent that she must implement the operating subsidy program, valuable resources are diverted from more effective programs such as section 8. Her judgment as to the more successful program, to which scarce resources should be devoted, is to be respected by the courts.

#### CONCLUSION

For the reasons stated herein and in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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OCTOBER 1976.

CERTIFICATE OF SERVICE

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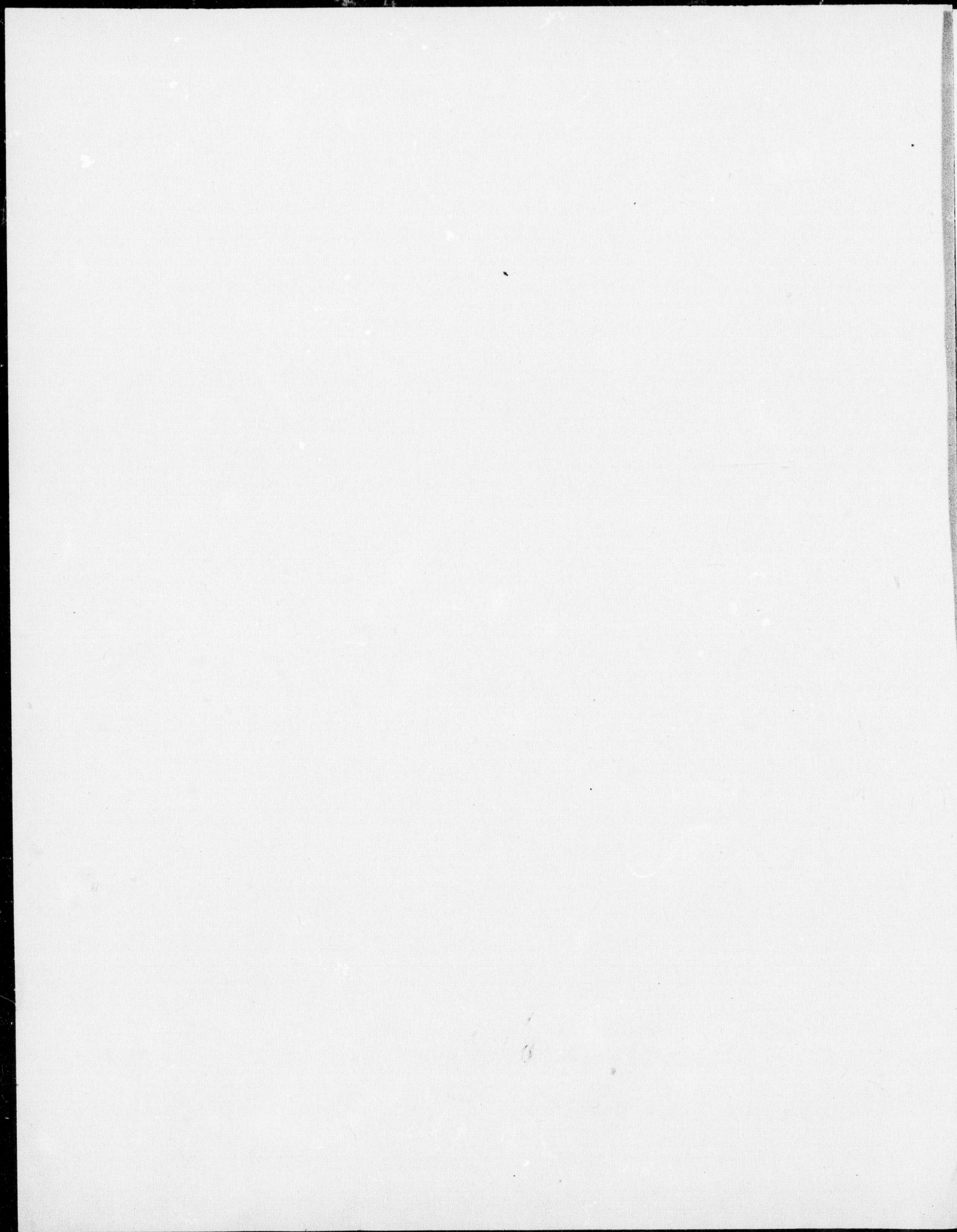
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A D D E N D U M



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THE UNDER SECRETARY OF HOUSING AND URBAN DEVELOPMENT  
WASHINGTON, D. C. 20410

MAY 14 1976

Honorable Carl B. Albert  
Speaker of the House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

In a letter to the Congress dated April 20, 1976, the Comptroller General reports a "rescission of Department of Housing and Urban Development (HUD) budget authority which should have been, but was not, reported to the Congress pursuant to the provisions of the Impoundment Control Act of 1974." We do not believe that the Comptroller General's action is correct under the Impoundment Control Act for the reasons specified below.

This alleged rescission relates to excess rental income returned by project owners to the Section 236 Rental Housing Assistance Fund. Under certain circumstances, these funds may be used to pay operating subsidies to project owners on behalf of qualified tenants. A rescission proposal is required whenever the President determines that "budget authority" should be rescinded or whenever "budget authority" provided for only one fiscal year is to be reserved from obligation for such fiscal year. It is the Department's position that no rescission proposal was required with respect to the Rental Housing Assistance Fund in view of the fact that the balance contained in that fund does not constitute "budget authority" within the meaning of the Impoundment Control Act of 1974.

The Rental Housing Assistance Fund was created by Section 236(g) of the National Housing Act, as amended, which provides in pertinent part that:

"The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f). During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section."

Under the terms of the Impoundment Control Act of 1974, the term "budget authority" is defined as authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds. However, the Rental Housing Assistance Fund does not constitute budget authority within the meaning of the Act.

As is indicated by the statutory language quoted above, the Rental Housing Assistance Fund contains cash which has been returned to the Department by Section 236 project owners where excess rents have been collected from tenants. These funds may be used to liquidate contractual commitments authorized in an appropriation act, but do not create authority to enter into new contractual commitments. To assume otherwise would be to assume that the Secretary could "create" contract authority outside the normal authorization and appropriation process. It is clear, therefore, that the Rental Housing Assistance Fund provides the Secretary with no authority to enter into obligations which will result in immediate or future outlays.

Moreover, even if it were assumed that the reserve fund is budget authority, there would be no authority to make payments out of that Fund. Pursuant to Section 236(g), as amended, until the Secretary determines that the balance contained in the reserve fund (Rental Housing Assistance Fund) is adequate to meet estimated operating subsidy payment requirements for a given "period," the amount in that Fund is not available for making additional assistance payments. No such determination has been made by the Secretary.

The Secretary has defined the "period" referred to in that Section as a fiscal year. She has estimated that a nationwide implementation of the operating subsidy program for Fiscal Year 1976 will require at least \$51.4 million. The current balance contained in the Rental Housing Assistance Fund aggregates only \$46.3 million, and will be reduced, as indicated in the letter from the Comptroller General by approximately \$18 million to compensate project owners for excess rent payments erroneously remitted to HUD prior to June 1975. Thus, even if the fund were budget authority, the amount available is clearly not adequate to meet estimated operating subsidy payment requirements within the meaning of Section 236(g).

Finally, even if the Secretary were to determine that the Rental Housing Assistance Fund is adequate to meet estimated operating subsidy requirements, the balance contained in the Fund must be first credited to appropriations authorized by Section 236(i) before it may be used to make any payments. The appropriations referred to in subsection (i) are for the liquidation of contracts, and do not constitute contract

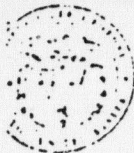
authority. Therefore, the amount credited to appropriations, which is the balance formerly contained in the Rental Housing Assistance Fund, does not constitute budget authority as defined by the Impoundment Control Act.

For the foregoing reasons, the Department respectfully disagrees with the conclusion of the Comptroller General that the Department's failure to submit a rescission message concerning the Rental Housing Assistance Fund constitutes an unreported rescission under the provisions of the Impoundment Control Act of 1974.

An identical letter has been sent to the President of the Senate.

Sincerely,

John B. Rhineland (Signed)  
John B. Rhineland



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

(15172) 1711-1 110

July 7, 1976

B-115398

Speaker of the House  
President of the Senate

The purpose of this letter is to inform you of the status of budget authority, proposed to be rescinded pursuant to the Impoundment Control Act of 1974, Pub. L. 93-34, for which the Congress did not complete action before the relevant 45-day period of continuous session, which expired on June 16, 1976. This letter also constitutes the statement required by section 1016 of the Impoundment Control Act in order for the Comptroller General to initiate a civil action to require the release of budget authority.

Section 212 of the Housing and Community Development Act of 1974, Pub. L. 93-383, created an operating subsidy program. This program provided for making payments to assist owners of rental housing projects, under section 236 of the National Housing Act, to meet higher operating costs resulting from increased property taxes and utility costs. The 1974 Act provided that these payments be made from a reserve fund--the Rental Housing Assistance Fund--comprised of excess rents paid by tenants residing in section 236 projects and interest earned by the Fund.

As of May 31, 1976, the balance in the Fund was approximately \$47.2 million. The Department of Housing and Urban Development estimates this balance may increase to approximately \$55 million by the end of Fiscal Year 1977. HUD estimated that about \$18 million from the Fund would be used to compensate project owners for excess rent payments erroneously remitted to HUD prior to June 1975. This action, however, may not be implemented due to a recently initiated court suit in which the plaintiffs are seeking to enjoin HUD from making its planned remittances. HUD estimates that \$300,000 will be used to make court-ordered payments under the operating subsidy program to those section 236 project owners who successfully sued HUD to require implementation of the program as regards those projects. HUD officials have informed us that they have no plans to utilize the fund for any operating subsidy program payments that are not mandated by court order.

OGC-76-29

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Section 1015(a) of the Impoundment Control Act requires the Comptroller General to report to the Congress whenever he finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States or any other officer or employee of the United States has ordered, permitted, or approved the establishment of a reserve or deferral of budget authority and the President has failed to transmit a special message with respect to such reserve or deferral.

On April 20, 1976, I submitted a report to the Congress with respect to a rescission of \$26.3 million of Department of Housing and Urban Development budget authority available for the operating subsidy program that should have been, but was not, reported to the Congress by the President. My report had the same legal effect as a rescission message transmitted by the President.

Section 1012(b) of the Act provides:

"(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.--Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved."

The statutory 45 days of continuous congressional session for the Congress to complete action on a rescission bill involving this budget authority expired on June 16, 1976. Pursuant to section 1012(b) of the Act this budget authority was required to be released for obligation by the President on that date. We have been informed by the Office of Management and Budget that the budget authority involved will not be released.

Section 1016 of the Impoundment Control Act empowers the Comptroller General to institute a civil action in the United States District Court for the District of Columbia to require the release of budget authority that is to be

made available for obligation pursuant to section 1012(b), above. Section 1016 also provides that, at least 25 days before the initiation of such a suit, the Comptroller General file with the Congress an explanatory statement of the circumstances giving rise to the action contemplated. On the basis of the present circumstances, we contemplate bringing such an action.

We would point out, however, that certain provisions of the Department of Housing and Urban Development--Independent Agencies Appropriation Bill, 1977, as passed by the House, would disperse the Fund to a number of other housing programs. Thus, it may develop that suit will not be necessary to require the release of the budget authority to the operating subsidy program. Nevertheless, in light of the uncertainty of the appropriations process and in order to avoid belated need to accommodate the statutory 25-day waiting period, we are notifying the Congress of our intention to bring suit on the basis of the present situation.

Sincerely yours,



Comptroller General  
of the United States

